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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-717

STUDENTS INTERNATIONAL MEDITATION SOCIETY,
Appellant,

v.

HIRAM RICKER & SONS,
Appellee.

On Appeal from the Supreme Judicial Court of the
State of Maine

MOTION TO DISMISS OR AFFIRM

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HIRAM RICKER & SONS,
Appellee.

On Appeal from the Supreme Judicial Court of the
State of Maine

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, Appellee Hiram Ricker & Sons ("Ricker") moves that the appeal herein be dismissed on the grounds that: (1) appeal does not properly lie here because the constitutional validity of the Maine certification rule was never drawn in question before the Maine Court; (2) the Appellant is barred, by an adverse decision of the certifying federal court on its Motion to Amend Certification, from relitigating the issue here

sought to be reviewed; and (3), finally, the federal question which the Appellant struggles to raise would if reached be so utterly unsubstantial as to be frivolous. In the alternative, Appellee Ricker moves that the judgment of the Maine Supreme Judicial Court which is herein appealed be affirmed on the ground that it is manifest that the questions on which the decision of the appeal depends are so utterly unsubstantial as not to need further argument.

STATEMENT

Students International Meditation Society ("SIMS") here appeals a July 24, 1975, decision of the Maine Supreme Judicial Court responding to unsettled questions of Maine law certified to it by the United States District Court for the District of Massachusetts¹ pursuant to 4 Me. Rev. Stat. Ann. § 57 (the "Maine certification statute") and Rule 76B of the Maine Rules of Civil Procedure (the "Maine certification rule").² The federal court has at all times retained jurisdiction.

¹ Hereinafter the Maine Supreme Judicial Court will sometimes be referred to as the "Maine Court," and the United States District Court for the District of Massachusetts will sometimes be referred to as the "Massachusetts District Court."

² SIMS had filed a previous Notice of Appeal, Jur. St., App. G, from the Order of the Maine Supreme Judicial Court, dated February 27, 1975, denying SIMS' Motion to Dismiss Certification, Jur. St., App. D. Although that Notice of Appeal, together with SIMS' Motion for Extension of Time to docket that appeal, Jur. St., App. H, are included in SIMS' Jurisdictional Statement, that appeal was not docketed within the prescribed time period as extended. Ricker accordingly moves under Rule 14(2) of this Court for the dismissal of that appeal on the additional ground of non-prosecution.

This Court has recognized the usefulness of certification in determining unsettled questions of state law. In *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), this Court noted that the certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." This Court has itself used certification in *Clay v. Sun Insurance Office*, 363 U.S. 207 (1960), *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), and *Aldrich v. Aldrich*, 375 U.S. 249 (1963).³ Rules 28 and 29 of the Rules of this Court, implementing this Court's jurisdiction to answer questions of law certified to it by courts of appeal and the Court of Claims under 28 U.S.C. §§ 1254(3) and 1255(2), are similar in important respects to the statutes and rules providing for federal-to-state certification.

The Maine Supreme Judicial Court has recently declared its view of certification thus:

"... it is, and will continue, a strong policy of this Court, as conducive to a sound federalism and the promotion of harmonious relations between federal and State Courts, to implement the certification process afforded by 4 M.R.S.A. § 57 in

³ Certification of questions of state law by federal courts is available in at least the following states in addition to Maine: Colorado, Colo. App. Rule 21.1 (1970); Florida, Fla. Stat. Ann. § 25.031, Fla. App. Rule 4.61; Hawaii, Haw. Rev. Stat. § 602-36 (1969); Louisiana, La. Rev. Stat. Ann. § 13:72.1 (1973); Maryland, Md. Ann. Code, Art. 26, § 161 (1973); Massachusetts, Mass. Sup. Jud. Ct. Rule 3.21 (1973); Montana, Mont. Sup. Ct. Rule 1 (1973); New Hampshire, N.H. Rev. Stat. Ann. § 490, App. Rule 20 (1973); Oklahoma, 20 Okl. Stat. Ann. §§ 1601-13; and Washington, Wash. Rev. Code Ann. §§ 2.60.010-030 (1972). Also, the National Conference of Commissioners on Uniform State Laws in 1967 promulgated the Uniform Certification of Questions of Law Act. 12 UNIFORM LAWS ANN. 52-56 (1975).

the fullest scope consistent with this Court's proper functioning." *White v. Edgar*, 320 A.2d 668, 676 (Me. 1974).

**The Federal Question Sought To Be Reviewed on
This Appeal**

SIMS' Jurisdictional Statement, p. 3, asserts that the question presented is "[w]hether the Maine certification law as applied in this case is repugnant to the fundamental requirements of due process of law" ⁴ Although SIMS thus attempts to phrase the issue in terms of the constitutionality of the Maine certification rule, the real issue on this appeal in fact relates to the contents of the certification order by which the Massachusetts District Court certified unsettled questions of Maine law. SIMS' complaint is directed at the refusal by the certifying federal court to incorporate by reference in the certification the transcript of the proceedings in the first federal jury trial as set forth in the three-volume Record Appendix on the prior appeal to the First Circuit Court of Appeals.

SIMS asserts that "the Maine Supreme Judicial Court controls the access of the parties to the record." Jur. St., p. 9. Such is not at all the case. In fact, under the Maine certification rule the certifying federal court at all times is required to include an adequate factual statement in the certificate. The rule requires

⁴ Although SIMS' Jurisdictional Statement vaguely refers to the "Maine certification law," the Maine certification statute, 4 Me. Rev. Stat. Ann. § 57, Jur. St., App. J, is merely a jurisdictional enactment and cannot possibly be subject to constitutional challenge. Thus, this appeal is in fact concerned solely with the Maine certification rule, M.R.Civ.P. 76B, Jur. St., App. K, and, more specifically, with certain acts taken thereunder by the Massachusetts District Court.

the certificate prepared by the certifying federal court to contain "a statement of facts showing the nature of the case and the circumstances out of which the question of law arises" M.R.Civ.P. 76B(b); Jur. St., App.K, p. 73. The power of the Maine Court to obtain the federal record merely supplements the requirement that the federal court's certification contain a statement of all material facts necessary to respond to the certified questions. This added provision in no way diminishes the requirement that in the first instance the certification by the federal court must state all material facts, and in no way requires or permits the Maine Court to respond to certified questions of law upon an inadequate factual statement.

Despite its purported attack on the validity of the Maine certification rule, the crux of SIMS' appeal to this Court is its complaint that the Massachusetts District Court, in certifying unsettled questions of Maine law to the Maine Supreme Judicial Court by a certification order which did not incorporate the record of disputed evidence made in the first federal jury trial and in subsequently declining to amend its certification order to incorporate that transcript, violated SIMS' due process rights. This claim is not appropriately raised on an appeal under 28 U.S.C. § 1257(2). ⁵

Prior Proceedings

Ricker commenced a diversity action in the Massachusetts District Court to recover unpaid amounts

⁵ SIMS' Jurisdictional Statement, p. 3, asks that alternatively it be treated under 28 U.S.C. § 2103 as a petition for writ of certiorari. Any petition for writ of certiorari in this case should also be denied for the reasons stated at pages 22-23 below.

due for rooms and food. Following a jury verdict in favor of Ricker and against SIMS on its counterclaim, SIMS appealed to the United States Court of Appeals for the First Circuit. On the ground that the Massachusetts District Court had erroneously admitted hearsay evidence affecting the amount of damages, the Court of Appeals reversed and ordered a new trial. As a result the transcript of the trial before the District Court, and the proceedings in that court, lost all evidentiary vitality. The record of evidence before the first federal jury became a dead record.

In its opinion the Court of Appeals also:

“instruct[ed] the district court first to certify to the Supreme Judicial Court of Maine the question of whether Ricker’s failure to comply with the Maine statutes on victualer’s licenses and sanitation licenses bars its recovery of any judgment against [SIMS] either in contract or in quantum meruit.” 501 F.2d 550, 558 (1st Cir. 1974); Jur. St., App. A, p. 27.

Under that mandate the Massachusetts District Court (Freedman, J.) certified to the Maine Court the questions of law specified by the Court of Appeals. SIMS (as well as Ricker) submitted a proposed form of certification to Judge Freedman. App. I to this Motion, p. 27; Jur. St., p. 11. SIMS’ proposed certification order did not request incorporation of the three-volume Record Appendix in the Court of Appeals. *Ibid.*

In its certification, preceding its statement of the specific questions of law certified, the Massachusetts District Court set forth a complete statement of all material facts necessary for the Maine Court to respond to the certified questions. Jur. St., App. B, pp. 30-33. The certification did not incorporate the three-volume

Record Appendix, which contained the transcript of the trial before the first federal jury. SIMS did not at that time express any dissatisfaction with the certification order and did not seek judicial review by the Court of Appeals of the adequacy thereof.

SIMS in due course filed its brief as the appellant or moving party before the Maine Court. In that brief SIMS included arguments on the basis of the dead record not before the Maine Court, a record which itself contained disputed evidence.⁶ On Ricker’s motion, the Maine Court struck those portions of SIMS’ brief which argued, from the dead record, questions not before the Maine Court.⁷ Jur. St., App. C.

SIMS then went back to the Massachusetts District Court and filed there a Motion to Amend Certification. By that Motion SIMS asked the Massachusetts District Court to add the following to the certification:

“Noncompliance with Title 22 Health Regulations noted by a field inspector of the Maine Department

⁶ SIMS’ Jurisdictional Statement is simply incorrect in asserting that the transcript of testimony in the first jury trial before the Massachusetts District Court contained “undisputed facts” not set forth in the certification. Jur. St., pp. 4, 5, 6, and 12. The certification, which was prepared by the Massachusetts District Court with the suggestions of counsel for both parties, App. I to this Motion, p. 27; Jur. St., p. 11, contained all undisputed facts material to the certified questions. The “facts” which SIMS attempted to place before the Maine Court were contained in raw testimony which was controverted by other testimony and evidence and was subject to appraisal by the fact-finder for credibility. On the basis of that testimony and other evidence the first federal jury found against SIMS on both its defense and counterclaim based on alleged nonperformance by Ricker. See 501 F.2d 550, 552-53 (1st Cir. 1974); Jur. St., App. A, pp. 16-17.

⁷ At two separate points SIMS’ Jurisdictional Statement incorrectly states that this ruling was made by a *single* justice of the Maine Supreme Judicial Court. Jur. St., pp. 5, 9. In fact that ruling was made by the entire Maine Court. Jur. St., App. C, p. 36.

of Health and Welfare, on July 10, 1970, resulted in the issuance of a license stamped "CONDITIONAL" on July 13, 1970, for the building called Poland Springs House, the principal eating and lodging building used by [SIMS] and housing 700 persons. Record testimony⁸ attached hereto." App. I to this Motion, p. 29.⁹

SIMS' Motion to Amend Certification filed in the Massachusetts District Court asserted its constitutional claim as follows:

"Serious questions of constitutional due process of law result from the combined effect of the certification document and the decision of the Maine Supreme Judicial Court censoring portions of [SIMS'] argument and refusing consideration of the fact record." App. I to this Motion, p. 28.

⁸ Apparently SIMS sought by this reference to "record testimony" to incorporate in the certification the entire three-volume Record Appendix.

⁹ In fact, the statement of facts in the certification from the Massachusetts District Court already included substantially the same statement:

"Sanitation licenses were issued for two of the buildings on July 13, 1970 after an inspection by the Maine Department of Health and Welfare on July 10. One of those licenses was conditional; the remaining five buildings were not inspected and the requisite licenses were never issued." Jur. St., App. B, pp. 32-33.

The Maine Court's response to the certified questions, 342 A.2d 262, 264 n.1 (Me. 1975); Jur. St., App. F, p. 50 n.1, recognizes this fact, and its response to the third certified question states its holding that the extent of Ricker's compliance with the licensing statutes is immaterial to its right to recover its damages. *Id.* at 269; Jur. St., App. F, p. 62.

The Massachusetts District Court denied that motion. App. II to this Motion, p. 31 (February 19, 1975).¹⁰ SIMS did not seek judicial review by the First Circuit Court of Appeals of the Massachusetts District Court's refusal to amend the certification to incorporate the three-volume Record Appendix. Thus, SIMS ignored the Court of Appeals despite the fact that it was that court which had instructed the Massachusetts District Court to avail itself of the Maine certification rule.

Instead SIMS returned to the Maine Supreme Judicial Court and moved for dismissal of the certification. SIMS there asserted the identical constitutional claim which the Massachusetts District Court had already adjudicated adversely to it on SIMS' Motion to Amend Certification:

"The censoring of the Appellant's brief and argument is a prejudicial violation of fundamental due process of law." Jur. St., App. D, p. 44.

The Maine Court denied that motion.¹¹ Jur. St., App. E, p. 47.

Thereafter the Maine Court, following full briefing and oral argument, responded, in a full opinion, to the questions certified to it by the Massachusetts District Court. Jur. St., App. F. The Maine Court held

¹⁰ SIMS' Jurisdictional Statement asserts that that motion was denied "on Ricker's argument that the Maine Supreme Judicial Court had already denied the same motion in another form." Jur. St., p. 5. There is no basis whatever, in the record or, we submit, in fact, for SIMS' implication that the Massachusetts District Court denied that motion otherwise than on its independent determination of the adequacy of the certification.

¹¹ SIMS filed a Notice of Appeal from that denial but has failed to prosecute that appeal. Accordingly, that appeal should be dismissed under Rule 14(2) of this Court. See note 2 above.

that Ricker's noncompliance with the licensing statute did not bar its recovery of the amounts due from SIMS. The court also held that the degree of Ricker's compliance with the licensing statute "has no bearing whatever on the enforceability of the contract." 342 A.2d 262, 269 (Me. 1975); Jur. St., App. F, p. 62. The Clerk of the Maine Court transmitted its answers to the Massachusetts District Court. App. II to this Motion, p. 31 (July 25, 1975).

In its Jurisdictional Statement SIMS has requested that this appeal be treated alternatively as a petition for writ of certiorari under 28 U.S.C. § 2103. The grounds of this Motion to Dismiss or Affirm equally compel denial of SIMS' petition for writ of certiorari. See pages 22-23 below.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED OR ALTERNATIVELY THE MAINE SUPREME JUDICIAL COURT'S DECISION SHOULD BE AFFIRMED.

A. Appeal Does Not Lie in This Case Because the Validity of the Maine Certification Rule Was Never Drawn in Question Before the Maine Court.

SIMS' Jurisdictional Statement asserts that this Court has jurisdiction on appeal under 28 U.S.C. § 1257 (2) because this appeal "draws into question the validity of the Maine certification law." Jur. St., p. 2. However, the simple fact is that SIMS never made any contention before the Maine Court that the Maine certification rule was unconstitutional. The Jurisdictional Statement, in trying to comply with this Court's Rule 15(1)(d), correctly states that the only federal claim raised before the Maine Court was that SIMS "was denied due process of law by the censoring of portions

of its brief and refusal of the Maine Supreme Judicial Court to permit [SIMS] to argue from the [three-volume Record Appendix]." Jur. St., p. 6. The maximum scope of any constitutional claim made by SIMS before the Maine Court appeared in a *single* sentence of its Motion to Dismiss Certification:¹²

"The censoring of the Appellant's brief and argument is a prejudicial violation of fundamental due process of law." Jur. St., App. D, p. 44.

This offhand claim does not, even given the most liberal reading, "draw in question the validity" of the Maine certification rule "on the ground of its being repugnant to the Constitution of the United States" as required for appeal jurisdiction under 28 U.S.C. § 1257(2). *Hanson v. Denckla*, 357 U.S. 235, 244 (1958).

To the extent that SIMS made a constitutional claim before the Maine Court, it did not bring itself within the ambit of those cases (*e.g.*, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921)) allowing appeals where the state statute is claimed to be invalid as applied. Here the Maine rule is unimpeachable. SIMS' only complaint lies in its claim that there was additional material which the certifying federal court should have incorporated into the certificate. Since SIMS did not draw in question the constitutional validity of the Maine certification rule (and of course the Maine Court made no decision on that unraised issue), appeal does not lie.

¹² The one-sentence claim made before the Massachusetts District Court in SIMS' Motion to Amend Certification complained only about the "certification document" and the Maine Court's "censoring portions of [SIMS'] argument and refusing consideration of the fact record." See page 8 above.

B. This Appeal Is Untimely and Improperly Presented, Because SIMS' Due Process Claim Was Previously Adjudicated Adversely to SIMS in the Massachusetts District Court, and Any Appeal from That Adjudication Should Have Been Taken Immediately to the Court of Appeals.

On this appeal from the Maine Supreme Judicial Court, SIMS claims that the certification prepared by the Massachusetts District Court violated its due process rights in that by not incorporating by reference the three-volume Record Appendix it limited SIMS in its argument to the Maine Court. SIMS' complaint attacks what the Massachusetts District Court did in making up its certification, and it is to that court that SIMS should have pressed its complaint as to the certification. It was the Massachusetts District Court (and not the Maine Court) that defined the questions being certified and knew what the federal record contained.

SIMS in fact recognized that its due process claim in regard to the adequacy of the certification must be presented to the Massachusetts District Court. On February 13, 1975, SIMS filed in the certifying federal court its Motion to Amend Certification, App. I to this Motion, pp. 25-30, by which it sought to have the three-volume Record Appendix incorporated by reference in the certification. In that motion SIMS asserted to the Massachusetts District Court the same due process claim which SIMS later made to the Maine Court¹³ and now presses on this appeal:

¹³ SIMS' Motion to Dismiss Certification filed on February 24, 1975, in the Maine Court made the same claim as follows:

"The censoring of the Appellant's brief and argument is a prejudicial violation of fundamental due process of law." Jur. St., App. D, p. 44.

It is solely upon the basis of that one sentence that SIMS can claim to have raised before the Maine Court any federal issue now sought to be reviewed. See pages 10-11 above.

"Serious questions of constitutional due process of law result from the combined effect of the certification document and the decision of the Maine Supreme Judicial Court censoring portions of [SIMS'] argument and refusing consideration of the fact record." App. I to this Motion, p. 28.

The Massachusetts District Court denied SIMS' Motion to Amend Certification, thereby rejecting SIMS' due process claim. See App. II to this Motion, p. 31 (February 19, 1975).

This decision of the Massachusetts District Court was its final action in regard to the certification. That decision, being "concluded and closed" and "a final disposition of a claimed right which [was] not an ingredient of the cause of action and [did] not require consideration with it," was immediately appealable to the First Circuit Court of Appeals under the "collateral order" rule. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); 9 J. MOORE, FEDERAL PRACTICE par. 110.10 (2d ed. 1975).

Having fully litigated its due process claim in the federal court which entered the allegedly unconstitutional certification order and having failed to appeal from the adverse decision of that court, SIMS cannot relitigate the identical claim in the state court or on appeal to this Court from the state court's decision. Just as the doctrines of law of the case, res judicata, and collateral estoppel establish a general principle of repose, so here SIMS should not now be heard to assert the claim previously adjudicated against it.

In attempting to appeal the decision of the Maine Supreme Judicial Court responding to the questions certified to it by the Massachusetts District Court,

SIMS has simply appealed the wrong decision from the wrong court at the wrong time.¹⁴ SIMS' appeal from this decision of the Maine Court in the state court proceeding should accordingly be dismissed as untimely and barred by the previous adverse determination of the certifying federal court.

SIMS' reliance on *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964), is wholly misplaced. SIMS' Jurisdictional Statement, pp. 2, 7-8, claims that the *England* case justifies SIMS' failure to pursue the federal appellate remedies available to it and supports its right to assert its federal constitutional claim of the inadequacy of the certification on this appeal from the Maine Court's decision answering the certified questions.

There are at least two clear distinctions between the circumstances of the *England* case and those of the case at bar. First, this case does not involve the plenary state court proceeding contemplated by, and involved in, the *England* case and its progeny. Rather, in the case at bar the federal court certified narrow questions of Maine law; those narrow questions defined the scope of the proceedings before the Maine Court.

Second, in any event the federal constitutional issue sought to be asserted on this appeal from the Maine Supreme Judicial Court was not a substantive element of the diversity action commenced and prosecuted in the federal court. Rather it is a constitutional attack

¹⁴ Highlighting this important point is the fact that any relief which SIMS would obtain if it prevailed on this appeal would come, not from the Maine Supreme Judicial Court, but rather from the Massachusetts District Court in the form of a new certification order.

upon the contents of the Massachusetts District Court's certification. The Maine Court proceeding to answer the certified questions is, and can only be, a limited interlude in the full adjudication of the federal action by the federal courts.

Under the circumstances of this abstention for the purpose of certifying questions of law to the state court, SIMS did not have any option to delay assertion of its federal constitutional claim (relating to the certification by the federal court) until after the completion of the entire certification process in the state court. Rather it was required to assert any complaint as to the procedure followed by the Massachusetts District Court directly and immediately to that court, subject to appeal to the First Circuit Court of Appeals.

C. The Federal Question Is so Unsubstantial as Not to Need Further Argument.

SIMS' claim that due process of law required that the transcript of the first federal jury trial be incorporated by reference in the certification is so absolutely devoid of merit as to be frivolous. Neither the Massachusetts District Court nor the Maine Court could conceivably have reached any conclusion other than to reject SIMS' claim, and we respectfully request this Court to do the same.

1. The Maine certification rule amply safeguards the due process rights of the parties.

SIMS' Jurisdictional Statement, p. 3, contends that the Maine certification rule "is repugnant to the fundamental requirements of due process of law . . ."

Contrary to SIMS' assertion, the Maine Court has, and must have, full access to all material facts neces-

sary to its decision on certified questions of law. The federal court's certificate must contain a "statement of the facts showing the nature of the case and the circumstances out of which the question of law arises" ¹⁵ M.R.Civ.P. 76B(b); Jur. St., App. K, p. 73.

In its opinion below in this very case the Maine Court reemphasized its previous construction of the Maine certification rule: "The Court will respond to questions only when it is apparent from the certification itself that all material facts have either been agreed upon or resolved" 342 A.2d 762, 264 (Me. 1975); Jur. St., App. F, p. 51. See also *In re Richards*, 223 A.2d 827, 833 (Me. 1966).

Finally, the Maine certification rule provides that:

"The Supreme Judicial Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in answering any certified question of law." ¹⁶ M.R.Civ P. 76B(c); Jur. St., App. K, pp. 73-74.

This provision is an additional safeguard. It in no way authorizes the Maine Court to decide a certified question of law upon a factual statement which it thinks inadequate. Rather it enables the Maine Court to

¹⁵ Section 3 of the Uniform Certification of Questions of Law Act is almost identical in requiring the certificate to contain "a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose." 12 UNIFORM LAWS ANN. 53 (1975).

¹⁶ Section 4 of the Uniform Certification of Questions of Law Act contains almost identical language. 12 UNIFORM LAWS ANN. 54 (1975).

obtain all or part of the federal record when it believes it needs more background.

These provisions of the Maine certification rule, as well as the construction placed on that rule by the Maine Supreme Judicial Court, amply safeguard all due process rights in this and all other certification cases.

2. The transcript which SIMS claims should have been transmitted to the Maine Court had been nullified by the order of a new trial by the First Circuit Court of Appeals.

The Massachusetts District Court certified the unsettled questions of Maine law to the Maine Supreme Judicial Court following reversal by the Court of Appeals of its judgment entered upon a jury verdict in favor of Ricker. The Court of Appeals remanded for a new trial and instructed the District Court "first to certify to the Supreme Judicial Court of Maine" certain unsettled questions of Maine law. Jur. St., App. A, p. 27. The transcript of the first trial, which SIMS sought to put before the Maine Court, had been nullified by the Court of Appeals' decision directing a new trial. That transcript, which in any event is merely raw evidence containing no uncontested facts which are not stated in the certification, will be completely replaced in the new trial before the second federal jury, and the facts decisive to final disposition of the federal diversity action will be determined by that second jury on whatever record the parties make before it.

SIMS' appeal should be dismissed because the evidence contained in the transcript which SIMS sought to put before the Maine Court had been nullified by the Court of Appeals' decision ordering a new trial.

3. It is not the function of the Maine Supreme Judicial Court on certification to decide disputed issues of fact.

The Maine certification statute and rule limit the function of the Maine Court to deciding "questions of law" upon certification.¹⁷ 4 Me. Rev. Stat. Ann. § 57; Jur. St., App. J. p. 72; M.R.Civ.P. 76B(a); Jur. St., App. K, p. 73. The thrust of SIMS' Jurisdictional Statement (see, *e.g.*, p. 10) seems to be that the Maine Court in answering certified questions of law should take into account disputed questions of fact on a dead record. What the Jurisdictional Statement, p.10, refers to as "facts developed in the record" are merely recitals of testimony which was controverted in the now nullified federal trial and which of course will again be controverted on retrial.

The function of the Maine Court on this certification was to determine the unsettled questions of state law upon the undisputed material facts stated in the certification and to transmit that determination to the Massachusetts District Court. This is precisely what the Maine Court did.

SIMS' appeal should be dismissed because the Maine Court had before it all of the facts necessary to decide the certified questions of law and because, in any case, the Maine Court cannot decide disputed issues of fact upon certification.

¹⁷ Compare Rule 28(1) of this Court, relating to jurisdiction to answer certified questions, which provides:

"Questions of fact cannot be certified. Only questions or propositions of law may be certified"

This Court has held that it is not proper for the certificate to attempt to incorporate by reference the transcript of the record in the certifying court. *Dillon v. Strathcarn S.S. Co.*, 248 U.S. 182 (1918).

4. This Court has itself recognized the propriety of deciding certified questions of law upon the factual statement contained in the certification.

Rule 28(1) of the Rules of this Court, relating to certification of questions of law by a court of appeals or by the Court of Claims under 28 U.S.C. § 1254(3) and § 1255(2), specifies the contents of the certificate as follows:

"... the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises."

This language is for practical purposes identical to that of Maine Rule 76B(b) here under attack:

"The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the case and the circumstances out of which the question of law arises" Jur. St., App. K, p. 73.

Rule 28(2) of the Rules of this Court, by which this Court may require that the entire record be sent up, applies only on certifications from courts of appeals (not certifications from the Court of Claims) and then only for the purpose of "decision of the entire matter in controversy." See 28 U.S.C. § 1254(3). Before this Court "the certificate itself constitutes the record," Rule 29(1), and it seems clear that the provisions of this Court's Rule 29(3) permitting the parties to print in an appendix any portion of the record to which they wish to direct the Court's attention refers only to those situations where the entire record before a court of appeals is required to be sent up for decision of the entire matter in controversy. See STERN & GRESSMAN, SUPREME COURT PRACTICE 391 (4th ed. 1969).

This Court, as itself the certifying court, has certified unsettled questions of state law upon only the statement

of facts in the certification. In *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), this Court, pursuant to the Florida certification statute, Fla. Stat. Ann. § 25.031, and the Florida rule, Fla. App. Rule 4.61,¹⁸ certified to the Florida Supreme Court questions relating to the finality of the Florida judgments there on review by this Court. The certification stated the questions and appended a copy of the opinion below. The certification did not transmit any transcript or further record. The Florida Supreme Court responded that the petitioners "did not exhaust Florida's available appellate remedies . . ." *Dresner v. City of Tallahassee*, 164 So.2d 208, 212 (Fla. 1964). No issue was at any time raised either as to the adequacy of the certification or as to the validity of the certification statute and rule under which that determinative question of law was answered by the Florida Court.¹⁹

Similarly, in the earlier case, *Clay v. Sun Insurance Office*, 363 U.S. 207 (1960), this Court remanded to the Court of Appeals with instructions to certify two unsettled questions of state law to the Florida Supreme Court under the Florida certification statute.²⁰ This Court commended the "rare foresight" of the Florida

¹⁸ The Florida certification statute and rule are substantially identical to their progeny, the Maine statute and rule. See V. McKusick, "Certification: A Procedure for Cooperation between State and Federal Courts," 16 MAINE L. REV. 33, 40-42 (1964).

¹⁹ This Court subsequently dismissed the writ of certiorari in that case as improvidently granted. *Dresner v. City of Tallahassee*, 378 U.S. 539 (1964).

²⁰ The Florida Supreme Court had not at that time adopted rules pursuant to the statutory authorization. Florida Rule 4.61 was, however, promulgated prior to consideration by the Florida court of the certified question.

legislature in enacting the Florida certification statute. *Id.* at 212. In responding to the certified questions, the Florida Supreme Court stated:

"The facts and circumstances culminating in the instant litigation, and its history, are stated in detail in the opinions of the federal appellate courts referred to above. The salient facts necessary to our determination of the legal questions presented to this court for decision are, however, stated in the questions as certified to this court by the Court of Appeals." *Sun Insurance Office v. Clay*, 133 So.2d 735, 737 (Fla. 1961).

Elsewhere the Florida court noted that it decided the certified questions "[f]rom the facts set forth in the certified question . . ." *Id.* at 738. There was no suggestion that the Florida certification statute and rule used by this Court, to obtain an authoritative construction of a Florida statute, was constitutionally deficient in any respect. See *Clay v. Sun Insurance Office*, 377 U.S. 179 (1964).

In *Aldrich v. Aldrich*, 375 U.S. 249 (1963), this Court certified to the Florida Supreme Court questions relating to alimony decrees under Florida law. This Court transmitted only the certificate to the Florida Supreme Court. 375 U.S. 75 (1963). On subsequent review this Court reversed the judgment below on the basis of the Florida court's responses to the certified questions, *Aldrich v. Aldrich*, 378 U.S. 540, 543 (1964). Again there was no suggestion that the certification procedure used by this Court was constitutionally defective.

II. ANY PETITION FOR WRIT OF CERTIORARI IN THIS CASE SHOULD BE DENIED.

Appellant SIMS alternatively asks this Court to treat its appeal papers as a petition for writ of certiorari, pursuant to 28 U.S.C. § 2103. This case is no more worthy of review by this Court on certiorari than on appeal. Further argument is unnecessary to support the following reasons for not granting certiorari:

1. Any question as to the adequacy of the certificate in stating the "facts showing the nature of the case and the circumstances out of which the question of law arises" should have been raised before the certifying court, the Massachusetts District Court, subject to appeal to the First Circuit Court of Appeals. In fact SIMS did raise its present constitutional claim before the Massachusetts District Court in its Motion to Amend Certification, Appendix I to this Motion, p. 28, and that court in denying SIMS' Motion rejected its federal claim. SIMS did nothing to seek review of that adverse decision by the First Circuit Court of Appeals, the very court which had instructed the District Court to certify the questions of state law. That prior adjudication bars SIMS from relitigating the same issue in the Maine Court and on later appeal to this Court. This attempt by SIMS to obtain judicial review of the certifying federal court's decision simply comes too late and is made in an appeal from the wrong decision of the wrong court.

2. The decision not to incorporate the testimony and exhibits in the first federal jury trial into the certificate was clearly correct. All facts material to the certified questions of Maine law were set forth in the certificate as undisputed; and in any event the record of raw (and much disputed) evidence adduced before the

first federal jury was swept away by the First Circuit's order of a new trial. No possible due process right of SIMS was violated by any action of either the Maine Court or the Massachusetts District Court. SIMS' constitutional claim is, we respectfully submit, frivolous.

3. The issue sought to be reviewed in the present case is uniquely narrow. The issue is simply whether, under the *particular* circumstances of this *specific* diversity contract suit in the federal district court, due process requires amplification of the facts set forth by the federal district judge in the certification in order for the Maine Court to answer the *particular* questions of Maine law certified. There is no conflict of decisions on this issue, and none is likely to arise. Any decision would apply to this case, and to this case alone, and would be of no precedential value in any other case. This case is simply not worth expenditure of any of the valuable judicial resources of this Court.

Appellee Ricker submits that it is clear that there is no reasonable ground for granting any petition for writ of certiorari herein and that accordingly it is, pursuant to 28 U.S.C. § 2103, entitled to reasonable damages for its delay, and double costs.

CONCLUSION

FOR THE FOREGOING REASONS, Appellee Hiram Ricker & Sons respectfully moves that this Court dismiss this appeal or, in the alternative, affirm the decision of the Maine Supreme Judicial Court from which this appeal is taken.

In the event that the papers whereon this appeal was taken are regarded and acted upon as a petition for

writ of certiorari, Appellee Ricker also respectfully submits that any petition for a writ of certiorari herein should be denied and requests this Court, pursuant to 28 U.S.C. § 2103, to adjudge to Appellee reasonable damages for its delay, and double costs.

Dated: December 15, 1975

Respectfully submitted,

VINCENT L. McKUSICK

and

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APPENDIX I

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 71-1577-F

HIRAM RICKER & SONS, *Plaintiff*

v.

STUDENTS INTERNATIONAL MEDITATION SOCIETY, *Defendant*

Motion To Amend Certification

1. This action was tried in the United States District Court for Massachusetts resulting in a judgment for the Plaintiff Ricker on July 3, 1973.

2. On July 17, 1974, the United States Court of Appeals, First Circuit reversed and remanded the District Court judgment with instruction that the District Court first certify "to the Supreme Judicial Court of Maine the question of whether Ricker's failure to comply with Maine statutes on victualers licenses and sanitation licenses bars its recovery of any judgment against the Society either in contract or in quantum meruit. "Hiram Ricker & Sons v. Students International Meditation Society, 501 Fd. 2d 550, 558. (Attached hereto with "Supplemental Memorandum" to the Maine Supreme Judicial Court.)

3. In its opinion the First Circuit noted that under Maine decisional law, a party to a contract may not legally enforce a debt which arises from services illegally performed in contravention of the license laws and cited the 1897 decision of the Maine Supreme Judicial Court, *Randall v. Tuell* which barred recovery of a debt for board and lodging by an unlicensed innkeeper. The First Circuit specifically stated that it was the facts of the instant case which should be considered in light of the *Randall* decision:

"Yet even though the *Randall* decision has never been repudiated or modified since 1897, we are unclear

whether the Maine Court would apply it *to the facts of the instant case* so as to preclude recovery by Ricker either in contract or in quantum meruit."

4. The Maine certification Rule 76B provides that the certification should set out the questions of law and a "statement of facts" showing the "nature of the case and the circumstances out of which such questions of law arise". In an early certification case the Maine Court stated that the certification "statement of facts" is "*not a definitive finding by the court as to what the facts are.*" In *Re: Richards*, 223 A.2d 827 (1966). In a recent certification case the Maine Court stated that it intended to "implement the certification process . . . in the fullest scope consistent with the court's proper function." *White v. Edgar*, 320 A.2d 668 (1974). In the original proposal for the certification procedure in Maine, it was expressly argued that the Maine certification procedure would not foster the presentation of cases which are "divorced from the complete factual setting in which they may be more carefully understood." See Wright *Federal Courts* 419, Wright Book Review of *Maine Civil Practice*, 22 Maine L. Rev. 511, 513 (1970). It was specifically the policy of the certification procedure in Maine that ". . . the parties . . . would have all the protections that go with a fully adversary proceeding involving a concrete set of facts." 16 Maine L. Rev. 33, 41 (1964): *Certification: A Procedure for Cooperation between State and Federal Courts.*" Subsection (c) of Rule 76B was explicitly intended to promote the policy objective of complete factual background in certification cases. 16 Maine L. Rev. 33, 42. Subsection (c) authorizes the court to require that all or any portion of the Federal Record be filed with the certification.

5. In the proceedings before the First Circuit Court in this case an extensive fact record was assembled and reproduced in multiple copies at great cost to the parties. The fact record or "record appendix" contains all facts,

exhibits, testimony, and pleadings deemed by the parties as having possible significance to the legal issues in this case.

6. In August of 1974, at the request of Judge Freedman, each party submitted a draft or proposed Certification. The essential differences between the two proposals was that the Society proposed reference to the health hazard violations of the Title 22 license regulations. These facts were uncontroverted in the record testimony and they were included in a written report of a field inspector of the State of Maine Department of Health and Welfare. The significance of these facts was disputed by Ricker at the trial and in the First Circuit, but there is no controversy that the Title 22 license regulations were in fact violated. These health hazards were acknowledged in the opinion of the First Circuit even though the First Circuit never reached a consideration of the Title 22 Sanitation license violation:

"Midway through the course, two of the seven buildings were inspected and received sanitation licenses. However, one of these licenses was made 'conditional' because of health hazards found on the premises."

The certification was submitted to the Maine Supreme Judicial Court without hearing the parties and the parties were notified on October 1, 1974, by the Maine Court that the certification had been submitted to the Maine Court on September 3. (See Notification attached hereto). It has no reference to the health regulation noncompliance with the Title 22 license requirement.

7. Questions 2, 3 and 4 in the certification involve a consideration of the extent to which the Title 22 sanitation license requirements were violated. In particular, question 2 concerns the plaintiff's "*partial* noncompliance with the sanitation license requirement" and whether "such (partial) noncompliance precludes recovery and/or partial recovery." The plaintiff's partial noncompliance involves

its operation of the main eating and lodging building during the last half of the course under a so-called "conditional" license. There is no authority in Title 22 or the regulations for a "conditional" license and the Maine Court must decide in this case, whether a "conditional" license has any validity in order to consider the nature of the "partial" noncompliance in this case.

8. The Society's brief prepared for the Maine certification proceedings references the fact record appendix. The argument includes consideration of the Title 22 health regulation violations of the Title 22 license relative to questions 2, 3, and 4 in the certification (attached hereto). The Society moved for leave to file the fact record with the filing of its brief.

9. Ricker then moved to strike the Society's brief and opposed filing of the record appendix. The memoranda of the parties and the discussion of the Court are attached hereto. The Maine Court ordered all reference to the Title 22 health regulations stricken from the Society's brief.

10. The rationale of the Maine Court in censoring portions of the Society's brief has not been stated. The decision appears to be contrary to the prior decisions of the Maine Court, and the authorities on the subject of the certification procedure, and it tends to validate the argument of the critics of the certification procedure. Thus, facts which were part of the record of this case which are favorable to the Society's contentions have vanished en route from the First Circuit Court of Appeals to the Maine Supreme Judicial Court. Serious questions of constitutional due process of law result from the combined effect of the certification document and the decision of the Maine Supreme Judicial Court censoring portions of the Society's argument and refusing consideration of the fact record. Moreover, the certification, stripped of the factual background underlying the issuance of the conditional license, will not fulfill the express intent of the First Circuit Court

in ordering the certification (that the Maine Court should consider the application of its laws to the facts of the instant case). In other words, the certification as it now stands could generate the necessity of a second certification to consider the issues relative to the actual facts in the instant case.

11. This entire difficulty could be resolved by an amendment to the certification which would allow the Society the full benefit of its argument, and its right to a hearing on the merits of its contentions could thus be preserved.

WHEREFORE, the Defendant moves that the Certification be amended as follows:

"Noncompliance with Title 22 Health Regulations noted by a field inspector of the Maine Department of Health and Welfare, on July 10, 1970, resulted in the issuance of a license stamped "CONDITIONAL" on July 13, 1970, for the building called Poland Springs House, the principal eating and lodging building used by the Society, and housing 700 persons. Record testimony attached hereto."

A motion to stay proceedings has been filed in the Maine Supreme Judicial Court pending resolution of this motion.

Respectfully submitted

GEORGE R. HALSEY
DEUTSCH & KRASNOW
141 Milk Street
Boston, Massachusetts 02109
(617) 542-8855

Oral hearing is requested of one hour at the earliest convenience of the Court.

CERTIFICATE OF SERVICE

I, George R. Halsey, of Deutsch & Krasnow certify that on February 11, 1975, I gave notice of the filing of the foregoing Motion to Amend Certification by mailing a copy thereof, postage prepaid to: Enid M. Starr, Esq., Barron & Stadfeld, 18 Tremont Street, Boston, Massachusetts 02108, and Vincent L. McKusick, Esq., Pierce, Atwood, Scribner, Allen & McKusick, One Monument Square, Portland, Maine 04111.

GEORGE R. HALSEY

[ATTACHMENTS OMITTED]

APPENDIX II

Docket Entries in the Massachusetts District Court

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Date	Proceedings
Feb. 18—	P's opposition to the defendant's motion to amend certification FILED with cs.
Feb. 18—	P's memorandum in opposition to the defendant's motion to amend certification FILED with cs.
Feb. 19—	FREEDMAN, J. re motion to amend certification—after hearing, motion denied. (by Karl Fagan, Deputy Clerk).

CASE TRANSFERRED TO JUDGE SKINNER.

1975

July 25—Copy of Opinion from district of Maine, filed.

Aug. 5—Letter to P. Lyons from E. M. Starr dated 8/1/75 re: speedy new trial, filed.

Aug. 8—Letter to P. Lyons from G. R. Halsey dated 8/8/75 re: letter of 8/5, filed.

A TRUE COPY ATTEST:
 GEORGE F. McGRATH, *Clerk*
 U. S. District Court
 Dist. of Massachusetts

By /s/ ELIZABETH S. MUNAY
Deputy Clerk